**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 013613-00**

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| Marthedala Chery | Employee |
| Beth Israel Deaconess Medical Center | Employer |
| Beth Israel Deaconess Medical Center | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges McCarthy, Costigan and Horan)

**APPEARANCES**
David Green, Esq., for the employee
Richard N. Curtin, Esq., for the self-insurer at hearing
Peter P. Harney, Esq., and Gregory M. Iudice, Esq., for the self-insurer on appeal

**MCCARTHY, J.** The self-insurer appeals from a decision similar to that which spawned our recommittal for a hearing de novo in Leary v. M.B.T.A., 19 Mass. Workers' Comp. Rep. ___ (March 28, 2005), in that the decision at hand is likewise "so carelessly drafted as to render effective appellate review impossible." Id. Therefore, because the administrative judge no longer serves the department, we reverse the decision and recommit the case for a hearing de novo.

Ms. Chery injured her back moving a patient while working as a nurse's aide on April 3, 2000. (Dec. 4.) She remained out of work, with the exception of one day, until around June 2001, when she started a part-time sedentary job with "Favorite Nurses." (Dec. 4-5, 7; Insurer Ex. 3; Tr. 63-64.) The employee earned varying amounts while working for Favorite Nurses over the next several months. (Insurer Ex. 3; Tr. 63-64.) The exclusive medical evidence of the § 11A examiner established that the employee had a light duty work capacity at least as of his June 12, 2002 examination. (Dec. 6-7.)

The judge awarded weekly temporary total incapacity benefits from the date of injury, April 3, 2000 to statutory exhaustion on April 3, 2003. (Dec. 9.) The award, unsupported by subsidiary findings of fact, lay or medical evidence, is arbitrary and capricious. Indeed, the self-insurer correctly points out that the employee actually earned

wages at numerous times during the period covered by the § 34 award. (Insurer Ex. 3; Tr. 63-64.) Under G. L. c. 152, § 35D, this is *per se* error of law.[1]

We need not belabor the numerous other problems with the decision.[2] We reverse the decision and transfer the case to the senior judge for reassignment and a hearing de novo.[3]

So ordered.

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| William A. McCarthy | Patricia A. Costigan | Mark D. Horan |
| Administrative Law Judge | Administrative Law Judge | Administrative Law Judge |

Filed: ***May 12, 2005***

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[1] General Laws c. 152, § 35D, provides, in pertinent part:

> For the purposes of sections thirty-four, thirty-four A, and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following :
>
> (1) The actual earnings of the employee during each week.

[2] An example is the listing of liability as a disputed issue in the case, (Dec. 2), even though the parties stipulated to the occurrence of the industrial injury on April 3, 2000. (Dec. 3.)

[3] The employee has filed a "motion" with the reviewing board for a § 8(1) penalty, due to the self-insurer's alleged failure to timely pay the award of benefits ordered in the decision. The reviewing board does not have jurisdiction over the matter alleged in the "motion." The employee may either file a separate *claim* for the penalty, see 452 Code Mass. Regs. § 1.07(2)(b), or may seek to join that issue for adjudication at the de novo hearing on recommittal.

We note that our reversal of the decision, upon which the employee's § 8(1) claim is based, is not pertinent – in any way – to the merits of the employee's allegation that the self-insurer failed to pay the benefits ordered in that decision within the time prescribed by § 8(1). *"Any failure* of an insurer to make all payments due an employee under the terms of an order, decision, [etc.] . . . within fourteen days of the insurer's receipt of such document, shall result in a penalty . . . ." G. L. c. 152, § 8(1) (emphasis added). The statute provides no exception based on the quality of a decision ordering benefits.